IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE

CIVIL REVISION APPLICATION NO.137 OF 2004

Kishore D. Mavani & Ors. ..Appllicants

Versus

Damodar Bhavan Co.op. Housing Society Ltd. & Anr. ..Respondents

Mr.A.G.Damle for applicants

Mrs. Badadane for respondent no.1

CORAM : A.M.KHANWILKAR,J.

DATE : 8TH FEBRUARY, 2006.

P.C.:

1. Heard the counsel for the parties. Perused the original record which was summoned having regard to the stand taken by the parties.

2. Basically, two points have been canvased before

this Court pursuant to the order passed by the trial court dated 26.11.2002 in Notice of Motion No.3523 of 2002. The respondent filed the suit. The suit came to be dismissed on 1.9.1999. The Roznama for that date records that parties and advocates are absent. The suit accordingly came to be dismissed for default. The respondents-plaintiffs filed notice of motion No.3523 of 2002 for setting aside the order of dismissal for default. That notice of motion has been granted by the lower court on the reason, from the materials on record the case made out by the plaintiffs, that they had no knowledge about passing of the order dated 1.9.1999 till August 2002 was genuine explanation and was sufficient cause made out by the plaintiffs. That reason has been put in issue before this court on two basis. First argument is that the finding recorded by the court below that the respondents-plaintiffs had no intimation is contrary to the record. The Roznama records that the court intimation was sent to the plaintiffs and defendants nos.2 and 3, while adjourning the matter to 16.3.1999. On 16.3.1999 the board was discharged and case was adjourned to 5th April 1999. Once again on 5th April 1999 the board was discharged and matter was adjourned to 6th May 1999. Thereafter the noting made on 6th May 1999, the Roznama

records that the parties and advocates are absent despite the intimation given. Relying on this noting Mr.Damle contends that there is clear evidence to the effect that the respondents-plaintiffs were duly informed about the date of proceedings and having failed to appear on the relevant date, the order of dismissal of suit cannot be recalled. The Court below considered these aspects in detailed in para 12 of the impugned judgment. The Court below has in substance observed that although the Roznama records that intimation was given to the plaintiffs, however, there was no corroborative material on record to conclude that such intimation was actually received by the plaintiffs at any point of time. For this purpose the record and proceedings were called. In my opinion, the view taken by the trial court on the factum of service of the intimation sent to the plaintiffs pursuant to the order dated 5.2.1999 is a possible view.

3. Mr. Damle then contends that the respondents have asserted before the lower court that they had no knowledge about the dismissal of the suit till 1st August 2002, which assertion is falsified from the material on record. He placed reliance on the communication sent by the advocate for the petitioner to the advocate for the

plaintiffs society dated 3.9.2001 at page 45 of the paper book. This letter indeed states that the suit for specific purpose filed by the respondents has been dismissed. However, what has been overlooked by the learned counsel is the clear stand taken on affidavit by the respondents-plaintiffs before the lower court, in the affidavit dated 25.10.2002. In para 7, the respondents have clearly asserted that the said letter dated 3.9.2001 allegedly sent by the advocate for the defendants to the plaintiffs is not on record of the society nor it is received by the society. In substance the court below has accepted the explanation given by the respondents on affidavit that even that communication was never received by the plaintiffs. The plaintiffs had no knowledge about the dismissal of the suit till August 2002 as contended. Mr. Damle contends that merely stating such fact an affidavit will not absolve the plaintiffs,. They ought to have examined the witness in support of this case. However, no such argument was canvased before the lower court nor that ground has been specifically taken in the memo of revision application as is filed. The applicants cannot be allowed to raise new plea that too across the bar and take the other side by surprise. Suffice it to observe that the lower court has considered all the

objections and answered the issue in favour of the respondents. That is a possible view, for the reasons recorded earlier.

5. Suffice it to observe that the present proceedings taken out by the applicants is in revision application against the impugned judgment. It is well settled that in revisional jurisdiction merely because some other view is possible the court will not reverse the discretionary order passed by the lower court by taking other view. In such a situation the court should be loath to interfere in the revisional jurisdiction. Hence this revision application is dismissed.

6. The Office is directed to return the record and proceedings to the lower court forthwith so that the main proceeding can proceed in that court.

7. Consequently the civil application is also disposed off.